

The Honorable John C. Coughenour

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON, AT SEATTLE

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ERWIN SINGH BRAICH,

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No. CV7 0177C

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Plaintiff,

)

12

vs.

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STEVE MITTELSTAEDT, et al,

)

**BRIAN G.N. McLEAN'S AND
McLEAN & ARMSTRONG LLP'S
RENEWED MOTION TO DISMISS**

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Defendant.

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**Note on Motion Calendar:
March 7, 2008**

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I. INTRODUCTION AND RELIEF REQUESTED

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**BRIAN G.N. MCLEAN'S AND MCLEAN &
ARMSTRONG'S RENEWED MOTION TO DISMISS - 1**

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1 Section 215¹ of Canada's Bankruptcy and Insolvency Act ("BIA") did not divest the Court of subject
 2 matter jurisdiction, but noted that it nonetheless may have the discretion to dismiss plaintiff's suit
 3 against the McLean defendants and KPMG under the doctrine of international comity. The Court
 4 held that such discretion depended upon two preconditions: (1) Section 215 must be determined to
 5 have extraterritorial reach, as a matter of Canadian substantive law;² and (2) the Court must con-
 6 clude that it is appropriate to defer to the Canadian Court's desire to apply Section 215 extraterritor-
 7 ially on the basis of international comity. Order dated August 7, 2007 at 7:13-23. The Court noted
 8 that KPMG had already filed a motion seeking a declaration that plaintiff is required to obtain leave
 9 under Section 215 prior to bringing suit against the trustee and/or its agents in any forum, and an
 10 injunction prohibiting plaintiff from filing any suit against any party protected by Section 215 until
 11 leave was granted. Accordingly, the Court denied the defendants' motions but invited them to renew
 12 the motions after the Canadian court ruled upon KPMG's pending motion. The Court ordered the
 13 parties to supply it with a copy of the Canadian court's ruling regarding the extraterritorial appli-
 14 cation of Section 215.

17 The Supreme Court of British Columbia has now issued its ruling, concluding that Section
 18 215 applies extraterritorially, and under Canadian law, is properly interpreted to extend its protec-
 19 tions to agents of the trustee, including trustee's legal counsel—the McLean defendants. Accord-
 20 ingly, whether this Court should apply Section 215 as matter of international comity is ripe for decision.

22 ¹ Section 215 states, "Except by leave of the court, no action lies against the Superintendent, an official receiver, an
 23 interim receiver or a trustee with respect to any report made under, or any action taken pursuant to this Act." *Declaration*
of Douglas Knowles in Support of KPMG Motion to Dismiss, Ex. D.

24 ² With regard to the McClean defendants, the Court further stated that whether Section 215 of the BIA should be
 25 extended to agents of the bankruptcy trustee was a question of substantive Canadian law, and that any guidance that the
 Canadian court could provide on the subject would be elucidating. Order at 10:4-9.

1 For the reasons stated below, the McLean defendants submit that dismissal of plaintiff's complaint is
2 appropriate.

3 II. RELEVANT FACTS

4 To quickly refresh the Court's recollection of this matter, the background facts of this case
5 are as follows. Erwin Braich was petitioned into bankruptcy in the Canadian courts in June 1999.
6 Braich was determined to be bankrupt and KPMG, Inc. was appointed as trustee of the Braich estate.
7 KPMG retained McLean & Armstrong and Brian Mclean as counsel to the trustee. *Canadian Ruling*
8 at p.2, para 1.
9

10 In February 2007, Braich sued KPMG and the McLean defendants, among others, in this
11 Court alleging that defendants participated in a conspiracy to conduct unconstitutional searches,
12 seizures and the detention of Braich's property, depriving Braich of constitutional protections and
13 violating various laws. *Complaint, generally.*
14

15 KPMG and the McLean defendants moved to dismiss the plaintiff's claims against them
16 arguing, among other things, that plaintiff's claims were barred by his failure to obtain leave to sue
17 the trustee or its agents (McLean defendants) pursuant to the Canadian Bankruptcy Insolvency Act,
18 Section 215. As noted above, this Court denied the defendants' motions, pending a definitive answer
19 from a Canadian court regarding the intended reach and scope of Section 215. *Order dated August 7,*
20 *2007.*
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22 By order dated November 7, 2007, the Supreme Court of British Columbia by Chief Justice
23 Brenner, entered its decision on KPMG's motion regarding the reach and application of Section 215
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1 of the BIA (herein "the Canadian Ruling").³ The Supreme Court held:

2 I conclude that in the same manner that the BIA casts a duty on a bankruptcy
3 trustee to carry out its duties beyond Canada's borders where necessary, so too
4 does s. 215 confer on a trustee so engaged the statutory protection that leave must
be obtained from the Canadian bankruptcy court before any action foreign or
domestic is commenced against the trustee.

5 *Canadian Ruling* at p. 10, para. 34. This conclusion is consistent with the purpose behind Section
6 215, i.e., to protect the trustee against frivolous and vexatious actions and to allow for the proper and
7 unmolested administration of the bankruptcy estate. The Canadian court also reasoned that such a
8 conclusion was appropriate considering that trustees are required in the furtherance of their duties to
9 act extraterritorially. *Id.* at p. 8 – 10.

11 The Supreme Court further concluded that because Braich alleges that the McLean
12 defendants at all times acted within the scope and course of their employment for KPMG as trustee,
13 the protections of Section 215 should be extended the McLean defendants. Justice Brenner wrote:

15 In my view the benefits conferred on a trustee by s. 215 should also be conferred on
16 its lawyer-agent acting within the scope of his duties in representing the trustee.
17 When a lawyer is so acting under the BIA, there is an identity of interest between the
18 trustee and its lawyer of the same nature that existed between Kuehne & Nagel and its
employees in **London Drugs** and between the Crown and its agents in **Eldorado**.
McLean and his law firm are entitled to the protection of s. 215.

19 *Id.* at p. 14 -15, paras. 50 - 51. (Bolding in the original; underlining added.)⁴ Elsewhere in the

21 ³ This opinion was filed with the court in conjunction with the Third Status Report Regarding Related Proceedings in
the Supreme Court of British Columbia and Renewed Request for Dismissal [Docket #72].

22 ⁴ *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299, involved the propriety of extending
23 contractual exclusion or limitation clauses in favor of a corporation to the corporation's employees, acting within their
24 scope of employment. The Supreme Court of Canada held that the contractual clauses protected the defendant com-
pany's employees as well as the company. The conclusion was supported by the obvious fact that a corporation can act
25 only through its employees and the company and the employees have an identity of interest as regards the performance
of the employer's contractual obligations. Similarly, in *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551, the Supreme
Court of Canada concluded that the statutory immunity afforded to the Crown also extended to the Crown agents acting

1 Canadian Ruling the court states, "It is this Court's opinion that Braich cannot advance any claims
 2 including the Washington claim [Braich suit initiated on February 2, 2007 in the USDC for the
 3 Western District of Washing at Seattle] against any of the Applicants [KPMG defendants and
 4 McLean defendants] or any other party arising from his bankruptcy without first obtaining leave
 5 from this Court as required by the provisions of s. 215 of the BIA." *Id.* at pp. 2, para. 2; 16, para. 56.
 6 Thus, the Supreme Court of British Columbia filled this Courts need for an authoritative ruling
 7 regarding the reach and scope of Section 215.
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9 Having resolved the issue of the reach of Section 215, the KPMG defendants renewed their
 10 motion to dismiss, arguing that this Court should give effect to Section 215 as a matter of interna-
 11 tional comity and dismiss the plaintiff's claims against them. *KPMG Defendants' Renewed Motion*
 12 *to Dismiss*. KPMG argued that deference to Canada's view that Section 215 applies extraterri-
 13 torially is appropriate considering that: (1) the purpose behind Section 215 is to protect the trustee
 14 from frivolous and vexatious actions and no American interest would be served by allowing an
 15 unjustified lawsuit; (2) the Canadian legal system is a sister common law jurisdiction that bears
 16 striking similarities to the U.S. legal system and thus affords litigants appropriate due process
 17 protections; (3) there is no conflict between Canadian and U.S. bankruptcy law here in that leave of
 18 court is required before one may sue a bankruptcy trustee for actions arising from the trustee's
 19 actions falling within the scope of his or her duties. *KPMG Defendants' Renewed Motion to Dismiss*
 20 at pp. 10-11.
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24 within the scope of public purposes that the Crown is entitled to pursue. Again, the fact that the Crown must act through
 25 its agents and that there was a perfect identity of interests between the Crown and its agent warranted the extension of
 26 immunity. *Id.* at pp. 11-12, and 14-15 discussing these cases.

1 By order dated January 22, 2008, the Court granted KPMG defendants' Renewed Motion to
2 Dismiss, dismissing Braich's claims against them without prejudice.

3 III. LEGAL ARGUMENT AND AUTHORITY

4 The McLean defendants hereby renew their motion to dismiss the plaintiff's claims against
5 them. In light of the fact that Canada intended Section 215 to apply extraterritorially, and that under
6 Canadian law Section 215 applies and protects a trustee's agents including its legal counsel, the
7 principles of international comity warrant dismissal.
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9 Comity is "the recognition which one nation allows within its territory to the legislative,
10 executive or judicial acts of another nation, having due regard both to international duty and conven-
11 ience and to the rights of its own citizens or of other persons who are under the protection of its
12 laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). Generally speaking, United States courts grant
13 comity where it is shown that the foreign court is a court of competent jurisdiction, and that the laws
14 and public policy of the forum state and the rights of its residents will not be violated. *Allstate Life*
15 *Ins. Co. v. Linter Group, Ltd*, 994 F.2d 996, 999 (2nd Cir. 1993). "[A]s long as the foreign court
16 abides by 'fundamental standards of procedural fairness', granting comity is appropriate." *Id. citing*
17 *Cunard S.S. Co. v. Salem Reefer Serv. AB*, 773 F.2d 452, 457 (2nd Cir. 1985).
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19 Federal courts "have recognized that comity is particularly appropriate where . . . the court is
20 confronted with foreign bankruptcy proceedings". *Allstate Life Ins. Co.*, 994 F.2d at 999⁵ *citing*
21 *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713 (2nd Cir. 1987) ("American courts
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23 ⁵ In *Allstate Life Ins. Co. v. Litner Group Ltd*, the Second Circuit dismissed securities actions against an Australian
24 corporation arising from a public offering in the United States on the ground of comity and in view of the pendency in
25 Australia of liquidation proceedings. The court noted that the Australian proceedings although not identical to United
26 States bankruptcy proceedings were sufficiently similar that comity would not offend any laws or public policies of the
27 United States. *Id.* at 999-1000.

1 have long recognized the particular need to extend comity to foreign bankruptcy proceedings."); *see*
 2 *also Cunard S.S. Co.*, 773 F.2d at 456 ("American courts have consistently recognized the interest of
 3 foreign courts in liquidating or winding up the affairs of their own domestic business entities.");
 4 *Clarkson Co., Ltd. v. Shaheen*, 544 F.2d 624 (2nd Cir. 1976) (New York State courts recognize the
 5 statutory title of an alien trustee in bankruptcy so long as the foreign court has jurisdiction over the
 6 bankruptcy and the foreign proceeding has not caused injustice to New York citizens or prejudiced
 7 their statutory remedies, or violates laws of public policy.) "[U]nder general principles of comity
 8 . . . , federal courts will recognize foreign bankruptcy proceedings provided the foreign laws comport
 9 with due process and fairly treat the claims of local creditors." *In re Petition of Davis*, 191 B.R.
 10 577, 586 (Bkrcty.S.D.N.Y. 1996) *quoting* *Victrix S.S. Co., S.A.*, 825 F.2d at 714. A court's decision
 11 to extend comity to the laws, decisions or acts of a foreign country are discretionary and are there-
 12 fore reversed only for abuse of discretion. *Allstate Life Ins. Co.*, 994 F.2d at 999.

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 14 Here, the foregoing authorities warrant granting comity to the Braich bankruptcy proceedings
 15 in Canada and the Canadian court's desire to apply Section 215 of the BIA extraterritorially. First,
 16 there is no legitimate question regarding the Canadian court's jurisdiction or its competency. Braich
 17 is a Canadian citizen. He is subject to the Canadian court's jurisdiction. Further, Canada has long
 18 been recognized as competent sister common law jurisdiction. *See, e.g., Petition of Davis*, 191 B.R.
 19 at 587 ("Courts in the United States uniformly grant comity to Canadian proceedings. This is
 20 consistent with the treatment accorded by federal courts to foreign proceedings in 'sister common
 21 law jurisdictions.'"); *Clarkson Co., Ltd.*, 544 F.2d at 630 (Canada is a sister common law jurisdiction
 22 with procedures akin to those in the United States.); *Cornfeld v. Investors Overseas Services, Ltd.*,
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1 471 F. Supp. 1255 (S.D.N.Y. 1979) aff'd, 614 F.2d 1286 (2nd Cir. 1979 (comity requires deferral to
 2 pending Canadian litigation proceeding.) Accordingly, exceptions to comity based upon injustice to
 3 the forum's citizens, prejudice to forum creditor's statutory remedies, or violation of the laws of
 4 policies of the forum state, are construed especially narrowly). Importantly, plaintiff does not allege
 5 that the Canadian court lacks jurisdiction over his bankruptcy case and he does not allege insuffic-
 6 ient procedural due process protections in the laws of Canada respecting bankruptcies or suits
 7 against trustees or their agents. To the contrary, Section 215 specifically affords one seeking to sue
 8 a bankruptcy trustee the opportunity to be heard via a motion for leave to bring suit. Moreover,
 9 debtors aggrieved by actions of a trustee have direct recourse to the bankruptcy court under Section
 10 37 of the BIA. Finally, plaintiff does not allege that fundamental standards of procedural fairness
 11 will not be extended to him in seeking leave of the Canadian court to sue the McLean Parties as
 12 agents of the bankruptcy trustee KPMG.
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15 Second, this Court's deference to Section 215 of the BIA would not violate the laws or the
 16 public policy of the United States or the state of Washington. It is important to note that United
 17 States bankruptcy law is similar to the BIA as regards the scope of the trustee's responsibilities and
 18 power, and preconditions to suits against trustees. *See, generally, Petition of Davis*, 191 B.R. at 587
 19 discussing the analogous aspects of U.S. and Canadian bankruptcy laws. U.S. bankruptcy law
 20 entitles bankruptcy trustees to derived judicial immunity for actions taken with the bankruptcy
 21 court's approval. *In re Jackson*, 105 B.R. 542, 544-45 (9th Cir. (BAP) 1989). Furthermore, just like
 22 Section 215, under U.S. federal common law, an aggrieved party must obtain leave from the
 23 appointing bankruptcy court before it may sue a trustee for acts done in an official capacity and
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1 within the trustee's authority as an officer of the court. *Id.* at 545, citing *Barton v. Barbour*, 104 U.S.
 2 126, 136-37, 26 L.Ed. 672 (1881). Accordingly, applying Canadian law and enforcing Section 215
 3 would be consistent with U.S. law.

4 Additionally, Section 215 of the BIA does not violate and is, in fact, in line with federal and
 5 Washington State's public policy of discouraging frivolous and vexatious lawsuits. More specifi-
 6 cally Federal Rule of Civil Procedure 11 and Washington State Civil Rule 11 are designed to deter
 7 frivolous and vexatious lawsuits and thus address the same public policy concern as Section 215 of
 8 the BIA. *See Fed.R.Civ.Pro. 11; Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531,
 9 1536 (9th Cir. 1986) (One of the fundamental purposes of Rule 11 is to "reduce frivolous claims,
 10 defenses or motions and to deter costly meritless maneuvers, ... [thereby] avoid[ing] delay and
 11 unnecessary expense in litigation." (internal quotation marks and citations omitted)); *CR 11; Bryant*
 12 *v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992) (CR 11 . . . is a deterrent to frivo-
 13 lous pleadings.) Moreover, deference to the Canadian court on these issues serves the objectives
 14 established for the handling of cross-border insolvencies articulated in 11 U.S.C. Section 1501, e.g.,
 15 cooperation between United States courts and trustees and courts and trustees of other competent
 16 authorities of foreign countries involved in cross-border cases, greater legal certainty, fair and
 17 efficient administration of cross-border insolvencies that protect the rights of all creditors, debtors
 18 and other interested parties, and the protection and maximization of the debtor's assets. In prior
 19 briefings, plaintiff has failed to identify any actual conflict between Section 215 of the BIA and
 20 federal or Washington law. To the McLean defendants' knowledge, there is none.
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1 Finally, Section 215 does not violate any of Braich's rights or the rights of any Washington
 2 citizen because, as this Court noted in its August 7, 2007 Order "[a]pplication of section 215 would
 3 not operate to bar Plaintiff's action completely . . . ; Plaintiff would simply have to seek leave to
 4 proceed with the action. The standard for granting leave does not appear to be terribly high—the
 5 law is designed to prevent bankruptcy trustees from being harassed by frivolous and baseless
 6 lawsuits." *Order dated August 7, 2007* at p. 12 n.7. Under Section 215, Braich will be afforded an
 7 opportunity to be heard regarding his claims that the bankruptcy trustee's conduct was somehow
 8 inappropriate. Deferring to Canadian law and the Canadian bankruptcy court makes profound sense
 9 in that the Canadian court is most familiar with the debtor, the pending bankruptcy case, and the
 10 authority of the Canadian trustee under Canadian law. *See Order dated August 7, 2007* at p. 12 n.7
 11 (noting, "because of its familiarity with the course of the bankruptcy proceedings, the Canadian
 12 court is better equipped than this one to make the determination set out in section 215.")

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 15 Braich's protestations that his property or privacy rights have been violated and require
 16 immediate attention must be taken with a grain of salt. As an undischarged bankrupt, Braich is not
 17 entitled to possession of the assets of the bankruptcy estate under either Washington law or federal
 18 bankruptcy laws. Moreover, even if Braich's property or privacy rights were damaged by the con-
 19 duct about which he complains, requiring him to first raise those issues with the Canadian court and
 20 obtain leave to sue does no further injustice or harm Mr. Braich. In sum, Mr. Braich cannot show
 21 that he has any interest that is superior to the Canadian court's interest in previewing any suit against
 22 a trustee or its counsel to avoid frivolous lawsuits that could negatively affect the Canadian
 23 bankruptcy proceedings.
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Requiring Mr. Braich to abide by the requirements of Section 215 is in no way "unfair" to Mr. Braich. It must not be forgotten that Braich is a citizen of British Columbia, Canada. *Complaint* at para. 15. As a citizen of British Columbia, he has enjoyed the protection of Canadian laws. Consequently, he must expect to also bear the burden of the application of Canadian bankruptcy law to his activities. Mr. Braich is subject to Canadian court jurisdiction and he should not be heard to argue otherwise. *Daniels v. Powell*, 604 F. Supp. 689, 693-94 (N.D.Ill. 1985) (rejecting arguments of controlling shareholder and director of Bermudan company that comity should not be extended to Bermudan liquidation proceedings when shareholder and director participated in decision to incorporate the business under the laws of Bermuda.)

IV. CONCLUSION

The government of Canada has a paramount interest in policing its bankruptcy system and its bankruptcy officials. Because Section 215 is a Canadian statute, Canadian courts are better suited than a United States court to make the threshold determination under Section 215 of whether a suit for alleged wrong doing by Canadian bankruptcy officials has actual merit and is neither frivolous nor vexatious. Further, Canadian bankruptcy law generally, and the process required by Section 215, afford Braich sufficient due process, are consistent with federal bankruptcy law, and are designed to achieve the same public policies of insulating bankruptcy officials from meritless suits, and deterring frivolous actions that have the power to derail pending bankruptcy proceedings as our federal and Washington State civil rules. Mr. Braich, a Canadian citizen, cannot demonstrate any paramount interests to those of the Canadian court system or adduce any evidence that application of Section 215 would unfairly imperil or damage any of his rights. Accordingly, all the considerations

1 governing comity weigh heavily in favor of extending deference to Canadian bankruptcy law and
2 procedure by dismissing, without prejudice, Mr. Braich's claims against the McLean defendants.
3 Other federal courts have extended international comity to Canada regarding the application of
4 Section 215 of the BIA,⁶ and the McLean defendants submit that this Court should do so as well.

5 A proposed order is submitted herewith.

6 DATED this 11th day of February, 2008.
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8 BUCKNELL STEHLIK SATO & STUBNER, LLP

9
10 /s/ Jerry N. Stehlik

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11 Andrea Orth, WSBA#24355

12 of Attorneys for Brian G.N. McLean and McLean &
Armstrong, LLP
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24 ⁶ *In re Petition of Davis*, 191 B.R. at 585 (granting permanent injunction against creditor enjoining him from commencing or continuing any action against Canadian trustee without first obtaining leave of court pursuant to Section 215 of the BIA).
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